

United States Court of Appeals For the First Circuit

No. 21-1873

DISTRICT 4 LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS LOCAL LODGE 207; DAMON FAMILY LOBSTER
COMPANY, INC.; FOX ISLAND LOBSTER COMPANY, LLC; FRANK THOMPSON,

Plaintiffs, Appellees,

v.

GINA M. RAIMONDO, in her official capacity as Secretary of the
United States Department of Commerce; JANET COIT, in her
official capacity as Assistant Administrator of the NOAA
Fisheries; NATIONAL MARINE FISHERIES SERVICE,

Defendants, Appellants.

No. 21-1874

DISTRICT 4 LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS LOCAL LODGE 207; DAMON FAMILY LOBSTER
COMPANY, INC.; FOX ISLAND LOBSTER COMPANY, LLC; FRANK THOMPSON,

Plaintiffs, Appellees.

v.

CENTER FOR BIOLOGICAL DIVERSITY; CONSERVATION LAW FOUNDATION,
INC.; DEFENDERS OF WILDLIFE,

Intervenor-Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. Lance E. Walker, U.S. District Judge]

Before

Kayatta, Barron, and Gelpí,
Circuit Judges.

Erika B. Kranz, Todd Kim, Assistant Attorney General, Andrew C. Mergen, Alison C. Finnegan, and Taylor A. Mayhall on brief for appellants Gina M. Raimondo, Janet Coit, and National Marine Fisheries Service.

Kristen Monsell, Erika A. Fuller, and Jane P. Davenport on brief for intervenor-appellants Center for Biological Diversity, Conservation Law Foundation, Inc., and Defenders of Wildlife.

Jay P. McCloskey, Paula D. Silsby, Thimi R. Mina, Alfred C. Frawley IV, and McCloskey, Mina, Cunniff & Frawley, LLC on brief for appellees District 4 Lodge of the International Association of Machinists and Aerospace Workers Local Lodge 207, Damon Family Lobster Company, Inc., Fox Island Lobster Company, LLC, and Frank Thompson.

Ryan P. Steen, Stoel Rives LLP, Mary Anne Mason, General Counsel, Maine Lobsterman's Association, Jane C. Luxton, Kip J. Adams, and Lewis Brisbois Bisgaard & Smith LLP on brief for Maine Lobsterman's Association, amicus curiae.

November 16, 2021

KAYATTA, Circuit Judge. This case pits the Maine lobster industry against a federal environmental agency seeking to save the endangered North Atlantic right whale from extinction. Earlier this year, the National Marine Fisheries Service (the "Agency") issued a rule barring, from October to January each year, the most frequently employed methods of lobstering in a roughly 967 square mile area of the Atlantic Ocean thirty or so nautical miles off the Maine coast. The Agency implemented this new seasonal closure to reduce the risk that a right whale would become entangled in the ropes connecting lobster traps to buoys. Prior to the closure going into effect, several individuals and an organization affected by the closure joined as plaintiffs and asked the district court to postpone the enforcement of the new rule until that court could finally decide whether the new rule is lawful. The plaintiffs' preliminary request required the district court to predict how likely it is to find the new rule unlawful at the end of the case and to consider now what harms might result in the interim should an injunction either be granted or denied. Agreeing with the plaintiffs, the district court put the new rule on ice.

The government then appealed. It argues on the merits that the district court should not have issued its preliminary injunction. By separate motion, the government also asks us to issue a stay of the district court order so that the new seasonal closure would go into effect while the appeal proceeds.

For the following reasons, we grant the government's motion. As we will explain, the district court misapprehended the record and over-stepped its role in rejecting the judgments of the agency that Congress has charged with protecting endangered marine mammals. And, while there are serious stakes on both sides, Congress has placed its thumb on the scale for the whales.

I.

Congress enacted the Marine Mammal Protection Act nearly fifty years ago to ensure that marine mammals -- like the North Atlantic right whale -- are not "permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part." 16 U.S.C. § 1361(2). In 2019, the Agency estimated there were no more than 368 right whales left in the ocean, and the Agency has determined that no more than eight right whales, on average, can be "taken" every ten years if they are to reach their optimum sustainable population.¹ In other words, even one additional death a year increases the odds that the right whale will go extinct.

Entanglement in trap lines is a leading cause of serious injury and death in right whales, who otherwise live on average for four to seven decades. Nat'l Marine Fisheries Serv.,

¹ "Take" is a term of art meaning, in brief, an action that captures, kills, or has the potential to injure a marine mammal, or one that has the potential to disrupt its behavioral pattern. 16 U.S.C. § 1362(13), (18).

Biological Opinion (BiOp) 80, 136 (May 27, 2021). The Agency estimates that just under five right whales per year suffer serious injury or death due to entanglement in federally regulated fisheries.

Because of the critical nature of the right whale's population levels, there has long been federal regulation of certain fisheries aimed at reducing whale buoy and line entanglement. Most recently, an unexplained uptick in deaths in 2017² prompted the Agency to act anew. It reconvened the Atlantic Large Whale Take Reduction Team -- which includes members of the fishing and lobstering industries -- to propose amendments to the Atlantic Large Whale Take Reduction Plan. The Team, and later the Agency, considered several types of actions, including certain restrictions of fishing gear -- like requiring weaker lines -- and seasonal closure of particularly risky fishing areas.

In deciding which actions to take, the Agency used a peer-reviewed "Decision Support Tool" (the "model"). The model identifies so-called "hotspots" where right whales are most in danger based on where vertical buoy lines are likely to be, how strong those lines are likely to be, and where whales are likely to be. Nat'l Marine Fisheries Serv., Final Environmental Impact

² In 2017, seventeen right whale deaths were documented, and new information demonstrated a downward trend in the species' population since 2010.

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